In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-927

RALPH TROPIANO,
Petitioner,

vs.

ROBERT I. MOSELEY, WARDEN OF FEDERAL PENITENTIARY AT LEAVENWORTH, KANSAS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATUTES INVOLVED

28 U.S.C. 1404 CHANGE OF VENUE.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

CONNECTICUT GEN. STATS. 54-197. CONSPIRACY.

Any person who combines, confederates or agrees with another or others to accomplish any unlawful object by lawful means or any lawful object by unlawful means, or any unlawful object by unlawful means, if one or more of such persons do any act in furtherance of such combine, confederation or agreement, shall be fined not more than five thousand dollars or imprisoned not more than fifteen years or both, provided, if the crime which is the object of such combination, confederation or agreement is a misdemeanor, such person shall be subject to the same penalty as is provided by statute for the commission of the misdemeanor. No officer or member of any lawful organization shall be held liable for the unlawful acts of individual officers, members or agents of such organization except upon proof of participation in or authorization of such acts or of the ratification thereof.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the state court's charge violated the rule of *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, when the petitioner had requested the jury be instructed that no inferences could be drawn from his failure to testify?

II. Whether the admission into evidence, at the petitioner's state trial, of the statements of a police officer in conversations between the officer and an alleged co-conspirator, which occurred outside of the petitioner's presence, was a violation of due process when the police officer's statements gave meaning to the co-conspirator's declarations and the jury were informed that only the acts and declarations of specifically

named alleged co-conspirators made in furtherance of the conspiracy were binding on the petitioner after his membership in the conspiracy had been independently established?

STATEMENT OF THE CASE

This petition for a writ of certiorari requests a review of the judgment of the Court of Appeals for the Second Circuit which affirmed, without opinion, the judgment of the District Court for the District of Connecticut dismissing a habeas corpus petition in which the petitioner alleged constitutional error by the state courts of Connecticut upon his conviction for conspiracy (Conn. Gen. Stats. Sec. 54-197). The petitioner is presently a federal prisoner confined to the penitentiary at Leavenworth, Kansas and is scheduled to commence serving his state sentence upon his release from federal custody. For this reason, the petition for a writ of habeas corpus was brought under the pending sentence doctrine of *Peyton* v. *Rowe*, 391 U.S. 53, 88 S. Ct. 1549 (1968) against the respondent in the District Court of the District of Kansas and transferred to the District of Connecticut pursuant to 28 U.S.C. Sec. 1404(a).

The state charge upon which the petitioner was tried and convicted was in substance that he (and others tried separately) conspired in violation of Conn. Gen. Stat. Sec. 54-197 to "offer money to police officers with the intention of illegally influencing the officer's behavior so that illegal gambling and unlawful liquor establishments might be permitted to operate." (App. Petitioner's brief p. 70) The questions sought to be reviewed involve the court's charge to the jury. (App. Petitioner's brief p. 70) The present petition is the petitioner's second

request for a writ of certiorari to review his conspiracy conviction. His prior request, then to review the judgment of the Supreme Court of Connecticut, *State* v. *Tropiano*, 158 Conn. 412, 262 A.2d 147 (1969) was denied by this court. *Tropiano* v. *Connecticut*, 398 U.S. 948 (1970). With respect to the two questions now presented for review, an examination of the brief which accompanied the first petition will show that the first question claiming a violation of the *Griffin* rule was not presented earlier and that the second question as phrased by the petitioner, claiming a violation of due process in the admission into evidence of the conversations between the police officer and a co-conspirator was presented earlier in the same manner as in the present petition.

The respondent's interpretation of the two questions presented for review differs somewhat from the interpretation advanced by the petitioner. To show that the respondent's interpretation is the more accurate one and that neither question merits a grant of certiorari, having in mind the considerations of Rule 19, there has been included in an appendix to this brief certain exhibits which formed a portion of the record in the court below, namely the complete charge to the jury, the opinion of the Supreme Court of Connecticut and the petitioner's petition for a writ of habeas corpus. The decision of the Court of Appeals for the Second Circuit has also been included.

ARGUMENT

I.

THE PETITIONER'S COMPLAINTS ABOUT THE CHARGE DO NOT MERIT REVIEW BY CERTIORARI.

The petitioner had requested that the jury, at his state trial, be instructed that no inferences could be drawn against him because he did not testify. The language of both his request and the court's charge are set forth in his brief. (pp. 1, 6) Since such a request was made, it was proper for the court to instruct the jury on the subject. *Bruno* v. *United States*, 308 U.S. 287, 292, 294, 60 S. Ct. 198, 199, 200 (1939); *United States* v. *Russo*, (2d Cir. 1969) 413 F.2d 432, 434; *United States* v. *Schabert*, (2d Cir. 1966) 362 F.2d 369, 372. The claim of constitutional error is therefore limited to a determination of whether the charge, as given, in effect informed the jury that from the petitioner's silence, his guilt could be inferred. See *Griffin* v. *California*, *supra* at 14, 88 S. Ct. at 1223. Because of the petitioner's request, the Ninth Circuit decision of *United States* v. *DeLaCruz Bellinger*, 422 F.2d 723 (1970) cited on page 8 of his brief, wherein the court denied the request of counsel for two defendants to comment on the refusal of a third defendant to testify is not applicable to the present situation and is not authority for his claim that constitutional error was committed.

Briefly stated, the petitioner's claim is limited to the fact that the charge contained a negative rather than a positive precept. His argument is that:

(1) Although the jury were instructed that he, as an accused, had the right or election to testify, they were not instructed that he had a right not to testify but rather that he

had no obligation to do so and that no inference of any kind should be drawn from his election; and

(2) The language, in the charge, that no inference of guilt should be drawn against him for the reason that he failed to exercise his right [to testify] meant that the jury could infer that his silence could be considered with other evidence in determining his guilt and that this instruction was related to the presumption of innocence in such manner that the jury were invited to conclude that if the presumption were rebutted, an inference of guilt could be drawn from his silence.

The Court of Appeals by its affirmance without opinion adopted the district court's decision that no particular form was required to inform the jury of the petitioner's right to remain silent and that the comments of the [state] court must not be removed from their context but were to be considered within the framework of the entire charge. (See App. Petitioner's brief pp. 70, 72) *United States* v. *Gainey*, 380 U.S. 63, 71, 85 S. Ct. 754, 759 (1965); *United States* v. *Smith*, (4th Cir. 1968) 392 F.2d 302.

The correctness of the ruling below that the [state] charge did not violate the *Griffin* rule and the consequent lack of merit in this petition for certiorari is shown by the varied language combining both positive and negative terms, which have been approved by the several Courts of Appeals to explain an accused's exercise of the privilege against self-incrimination to juries. In two recent decisions from the Fifth Circuit, *United States* v. *McGann*, 431 F.2d 1104, 1109 (1970) and *United States* v. *Lawrence*, 427 F.2d 95, 97 (1970) the jury were instructed that the law does not compel an accused to take the witness stand and that his failure to do so does not

raise a presumption of guilt nor permit an inference of any kind to be drawn. In *United States* v. *Houston*, 434 F.2d 613, 614 (1970), also from the Fifth Circuit, an approved charge coupled language that an accused could not be compelled to take the witness stand with language that he had a choice whether or not to be a witness and that it was his right not to testify if he so chose. The instruction held to be proper in *United States* v. *Gustave*, (9th Cir. 1970) 424 F.2d 539, 540 was that "(T)he appellant was not required to take the stand in his own defense, and that his failure could create no inference against appellant." While in *United States* v. *Carter*, (6th Cir. 1970) 422 F.2d 519, 520, a proper charge was that no one was obliged to testify in his own behalf and since one had an absolute right not to testify, a failure to do so could not be considered as evidence of guilt.

Nor did the [state] court's reference to the presumption of innocence and the state's burden of proof when it informed the jury that no inference of guilt be drawn from the petitioner's failure to testify impinge on his constitutional rights in the manner claimed. The Fifth Amendment gives a defendant the right to refuse to testify, but it does not give him an irrebuttable presumption of innocence. *United States* v. *McGann*, *supra* at 1109. There is a permissible connection between an accused's silence, the sovereign's burden of proof and the presumption of innocence which may be the subject of comment to a jury when an accused has requested they be instructed that no inferences should be drawn from his silence. In *United States* v. *Garguilo*, (2d Cir. 1962) 310 F.2d 249, 252, the approved charge was as follows:

> "As I have told you at the outset of my charge to prove the defendants . . . guilty beyond a reasonable doubt, and

> the burden of proof rests upon the government at all stages of the trial. It never shifts to the defendants. The defendants are presumed to be innocent as I have already told you, and they had a right to remain silent, and you must not draw any inferences from the fact that they have remained silent and you must not allude to it in any way during your jury deliberations."

As in *Garguilo*, the instructions given at the petitioner's conspiracy trial did not lessen either the state's burden of proof nor the presumption of innocence. See Appendix, Respondent's brief pars. 181, 182, 183, 186, 187, 188, 189, 190, 192, 193, 243, 247; pp. 11a-16a. *Leland* v. *Oregon*, 343 U.S. 790, 795, 72 S. Ct. 1002, 1006, (1952), *reh. denied*, 344 U.S. 848, 73 S. Ct. 4 (1952); *Sullivan* v. *Scafati*, (1st Cir. 1970) 428 F.2d 1023, 1025.

Finally the decision below was correct that the words in the charge, that no inference of guilt should be drawn against the petitioner "for the reason alone" that he did not elect to exercise his right to testify, when viewed in their proper context did not constitute improper comment. See *United States* v. *Cusumano*, (2d Cir. 1970) 429 F.2d 378, 381; *United States* v. *Lawrence*, *supra* at 96. As heretofore stated, the petitioner was tried separately from others with whom he was accused of conspiring. The jury were properly informed (App. Respondent's brief pars. 201-238, pp. 19a-32a) that if, by independent evidence, they found the petitioner to be connected to the conspiracy he was chargeable with knowledge of the acts and bound by the declarations of his co-conspirators in pursuance of the conspiracy. *Dutton* v. *Evans*, 400 U.S. 74, 91 S. Ct. 210, 215, 216 (1970); *United States* v. *Costello*, (2d Cir. 1965) 352 F.2d 848, 853, 854. The proper construction

of the charge is that the jury were informed that the petitioner's guilt could not be inferred from his silence but that the existence of the conspiracy and the petitioner's participation therein could be determined from other proper evidence. The decision of the Court of Appeals that these instructions were proper was correct. *c.f. United States* v. *Curiale*, (2d Cir. 1969) 414 F.2d 744, 748; *United States* v. *Russo*, *supra*.

II.

The Petitioner's Claim That Due Process Was Violated By The Admission Into Evidence Of The Conversations Between An Alleged Co-conspirator And A Police Officer Does Not Merit Review By Certiorari.

At the state conspiracy trial, tape recordings of telephone conversations from February 10 to February 20, 1964, between an alleged co-conspirator and a policeman which conversations occurred in the petitioner's absence were admitted into evidence. (See App. Petitioner's brief pp. 1-68) The participants in the conversations are not identified in the petitioner's appendix but reference to the opinion of the Supreme Court of Connecticut (App. Respondent's brief pp. 40a, 45a) shows that "Francis" is Francis Reynolds, a detective with the West Hartford, Connecticut police department and "Thomas" is the co-conspirator, DiBella. "Whitey", of course, refers to the petitioner, Tropiano.

While the present thrust of the petitioner's argument is that the very admission of these conversations was a violation of due process (the same claim having been made to this court in his earlier petition for certiorari) his claim of error to the

state Supreme Court (App. Respondent's brief p. 45a) and in the habeas corpus petition (App. Respondent's brief p. 62a) that originated the proceedings now sought to be reviewed was not that the conversations were erroneously admitted but rather that their admission was not accompanied by cautionary or limiting instructions concerning the effect which the jury should give to Reynolds' statements in these conversations as distinguished from those of DiBella. Brought to the attention of the Court of Appeals as well as to the attention of the district court was the opinion of the state Supreme Court which noted "The substance of the conversations concerned the defendant's (petitioner's) role in the conspiracy and the defendant (petitioner) concedes that the court did not err in receiving the recordings and transcripts in evidence". (App. Respondent's brief p. 45a) Under state procedure such a concession would be an abandonment of a claim of error, constitutional or otherwise. *State* v. *Mariano*, 152 Conn. 85, 98; 203 A.2d 305, 312 (1964), *cert. denied*, 380 U.S. 943; Maltbie, *Connecticut Appellate Procedure*, Sec. 327. Although the respondent did not urge abandonment in the (federal) courts below but rather treated the claim, properly limited, on its merits as did the respective courts the petitioner's concession should be brought to the attention of this court under the doctrine of *Edelman* v. *People of State of California*, 344 U.S. 357, 358, 73 S. Ct. 293, 295 (1953) since in effect the petitioner seeks to have the court review a question on which certiorari has already been denied.

An analysis of the petitioner's claim shows that the decision of the Court of Appeals should not be reviewed. The admission of the statements of the co-conspirator, DiBella in the conversations was neither error nor a violation of due process.

Dutton v. *Evans, supra; United States* v. *Clayton,* (1st Cir. 1971) 450 F.2d 16, 19. Parenthetically the language of the [state] court's charge (see App. Respondent's brief, par. 238, p. 32a) shows that Connecticut is in accord with the federal rule that such declarations must be in furtherance of the conspiracy. See *Dutton* v. *Evans, supra; Krulewitch* v. *United States,* 336 U.S. 440, 443, 69 S. Ct. 716, 718. (1949). Out of court declarations of an alleged conspirator introduced to prove the truth of the matter asserted can be used against other alleged conspirators if there is independent proof of the conspiracy. *United States* v. *Costello,* (2d Cir. 1965) 352 F.2d 848, 853; *Taylor* v. *United States,* (D.C. Cir. 1958) 260 F.2d 737, 738. The order of proof in a conspiracy trial is in the discretion of the trial court. *United States* v. *Knight,* (9th Cir. 1969) 416 F.2d 1181, 1185. Since DiBella's statements were admissible, subject to connection, Reynolds' part of the conversation was also admissible either to bring out the meaning of DiBella's conversation, *United States* v. *Morello,* (2d Cir. 1957) 250 F.2d 631, 634 or to show DiBella's involvement in an existing conspiracy to which the petitioner might be linked by independent proof. *United States* v. *Costello, supra* at 854. Such independent proof of the conspiracy and the involvement of the petitioner therein did exist as shown by the evidence before the jury as recited in the opinion of the Connecticut Supreme Court (App. Respondent's brief pp. 37a, 42a, 43a) that arrangements were being sought for police protection of illegal gambling operations and on January 30, 1964, almost two weeks before the start of the conversations in question, DiBella had informed Reynolds, who was a witness at the trial, that the petitioner was the "top man" from whom payoffs would come and then at a meeting the petitioner, him-

self, told Reynolds "The only thing I want from Ahern (a New Haven, Connecticut police sergeant) are the crap games. Horses can come later" and discussed the amount that would be paid for this service.

Remaining to be considered is whether the decision of the Court of Appeals that the lack of express cautionary instructions, in this particular case, as to the use which the jury might make of the police officer's portion of the telephone conversation was not a violation of due process. The decision below, as shown by the opinion of the district court (App. Petitioner's brief p. 70) was in accord with the decision of the state Supreme Court which while acknowledging that cautionary instructions should have been given found such omission harmless. (App. Respondent's brief p. 46a) The jury had been instructed that they could not find the petitioner guilty unless they found that he had conspired with one or more of the specific persons named in the information as co-conspirators which names were repeated several times (App. Respondent's brief pars. 228, 229, 239, 240; pp. 29a, 32a, 33a); that the police officers, including Reynolds, were excluded from the named individuals with whom the petitioner was accused of conspiring and their role explained (App. Respondent's brief pars. 166, 221, 236; pp. 6a, 26a, 27a, 31a); that the acts and declarations of an alleged co-conspirator did not implicate the petitioner until he had been proved to be a member of the conspiracy by other evidence but once he had been proved to be such a member, the acts and declarations of a co-conspirator or in other words the acts and declarations of another person named in the information made in furtherance of the conspiracy were admissible against him. (App. Respondent's brief pars. 236, 237, 239; pp. 31a, 32a) Therefore the

charge adequately informed the jury that only the acts and declarations of co-conspirators in furtherance of the conspiracy could be used against the defendant which necessarily excluded Reynolds' portion of the telephone conversations.

The decision below that the "Although Reynolds' part in the conversation was not admissible to prove the truth of any assertions made by him, since he admittedly was not a co-conspirator nevertheless his portion of the conversation was admissible for the limited purpose of giving meaning and coherence to DiBella's statements" and that in effect the jury had been so instructed was correct. (App. Petitioner's brief p. 70, App. Respondent's brief p. 46a) *United States* v. *Morello*, *supra*; 7 Wigmore, *Evidence* (3d ed.) Secs. 2097, 2099.

CONCLUSION

The petitioner's second petition for a writ of certiorari this time to review the judgment of the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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